

1980

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Patricia A. Perrotta

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### Recommended Citation

Patricia A. Perrotta, *Judicial Sentence Bargaining in the Federal Courts*, 49 Fordham L. Rev. 586 (1981).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol49/iss4/8>

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# JUDICIAL SENTENCE BARGAINING IN THE FEDERAL COURTS

## INTRODUCTION

The procedures used to impose sentences on criminal defendants continue to provoke considerable debate within the criminal justice system.<sup>1</sup> Indeed, the significance of the sentencing process is underscored by the overwhelming number of defendants who, once formally charged with a crime, elect to plead guilty and proceed directly to sentencing without a trial.<sup>2</sup> For such defendants, only the sentencing judge<sup>3</sup> stands between them and a possible prison sentence of indeterminate length.<sup>4</sup> Much of the debate concerns the role of the judge in the sentencing process. Specifically, this dispute centers on the frequent judicial practice of measuring the defendant's potential for rehabilitation by, among other indicia,<sup>5</sup> the degree of his cooperation with law enforcement authorities.<sup>6</sup> This judicial sentence bargaining,<sup>7</sup> in which the

1. See, e.g., Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 1-65 (1976) [hereinafter cited as Task Force]; Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1978); Smith & Pollack, *On Jail and Freeing*, N.Y. Times, Feb. 4, 1980, § A, at 19, col. 2.

2. Santobello v. New York, 404 U.S. 257, 264 n.2 (1971) (Douglas, J., concurring) (90.2% of federal convictions in 1964 based on pleas of guilty); ABA Project on Standards for Criminal Justice, Appellate Review of Sentences 1 (Approved Draft 1968) [hereinafter cited as Appellate Review]; D. Newman, Conviction 3 (1966) (approximately 90% of all criminal convictions are by pleas of guilty).

3. A defendant who pleads guilty bypasses trial proceedings and immediately faces the sentencing judge. Note, United States v. Grayson: *Questionable Support for Broad Judicial Discretion in Sentencing*, 12 J. Mar. J. 407, 407 (1979) [hereinafter cited as *Questionable Support*]; see Appellate Review, *supra* note 2, at 1.

4. The indeterminate sentence is the primary sentencing scheme in the United States today. It is characterized by minimum and maximum sentences for particular crimes prescribed by the legislature. Consequently it gives a judge broad discretion in determining sentences. Task Force, *supra* note 1, at 11; see notes 15-17 *infra* and accompanying text. Some states, however, give juries in criminal cases a general sentencing power. See Ark. Stat. Ann. § 43-2306 (1977); Ky. R. Crim. P. 9.84 (1972); Mo. Ann. Stat. § 557.036 (Vernon 1979); Okla. Stat. Ann. tit. 22, § 926 (West 1958); Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon Supp. 1980); notes 57-61 *infra* and accompanying text.

5. Some of the factors considered by the judge include the defendant's educational, employment, social, and residential background. See notes 22-24 *infra* and accompanying text.

6. Compare DiGiovanni v. United States, 596 F.2d 74, 74 (2d Cir. 1979) (impermissible factor); United States v. Garcia, 544 F.2d 681, 685 (3d Cir. 1976) (same) and United States v. Acosta, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting) (same), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975) with United States v. Barnes, 604 F.2d 121, 154 (2d Cir. 1979) (permissible factor), *petition for cert. filed*, 48 U.S.L.W. 3179 (U.S. Aug. 17, 1979) (No. 79-261); United States v. Miller, 589 F.2d 1117, 1139 (1st Cir. 1978) (same), *cert. denied*, 440 U.S. 958 (1979); United States v. Williams, 579 F.2d 369, 371 (5th Cir.) (same), *cert. denied*, 439 U.S. 936 (1978) and United States v. Hayward, 471 F.2d 388, 391 (7th Cir. 1972) (same). A judge's request that a defendant cooperate with the authorities may be an indirect attempt to induce him to admit his guilt to the crime for which he has been convicted. See, e.g., United States v. Miller, 589 F.2d 1117, 1139 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). Although the issue is beyond the scope of this Note, the federal courts of appeal are sharply divided on whether a sentencing judge may request a convicted defendant to admit his guilt. Compare United States v. Allen, 596 F.2d

judge offers a more lenient sentence in return for cooperation by the defendant, has been attacked as both unconstitutional<sup>8</sup> and misguided.<sup>9</sup> Part I of this Note examines the development and nature of judicial sentence bargaining as well as the reactions of the federal appellate courts to the practice. Part II explores the constitutionality of the procedure in light of the fifth amendment's ban on compulsory self-incrimination. Finally, Part III argues that consideration by a sentencing judge of a defendant's willingness or unwillingness to cooperate does not necessarily promote the rehabilitation and deterrence goals of sentencing.

## I. THE DEVELOPMENT OF JUDICIAL SENTENCE BARGAINING

At common law the imposition of sentence was designed to exact retribution from the defendant and to discourage others from engaging in similar conduct.<sup>10</sup> These goals were accomplished by meting out fixed penalties for particular crimes.<sup>11</sup> The basic premise underlying the common law approach was that all human beings were inherently depraved—a belief that did not support the theory that criminals could be rehabilitated.<sup>12</sup> As society's perception of mankind changed, however, criminals came to be viewed as rational persons capable of rehabilitation.<sup>13</sup> Accordingly, the modern philoso-

227, 231 (7th Cir.) (permissible), *cert. denied*, 100 S. Ct. 149 (1979); *United States v. Rowen*, 594 F.2d 98, 102 (5th Cir. 1979) (same), *cert. denied*, 100 S. Ct. 67 (1979); *United States v. Miller*, 589 F.2d 1117, 1138-39 (1st Cir. 1978) (same), *cert. denied*, 440 U.S. 958 (1979) and *United States v. Santiago*, 582 F.2d 1128, 1137-38 (7th Cir. 1978) (same) with *United States v. Wright*, 533 F.2d 214, 216 (5th Cir. 1976) (impermissible); *Scott v. United States*, 419 F.2d 264, 267-68 (D.C. Cir. 1969) (same) and *LeBlanc v. United States*, 391 F.2d 916, 917-18 (1st Cir. 1968) (same).

7. The term "sentence bargaining" was suggested in Hagan & Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 Law & Soc. Rev. 467 (1979), to describe prosecutorial "bargaining tactics that involve strategic and explicit juxtaposition of coercive threats and promised concessions." *Id.* at 467. This Note does not discuss the bargaining for pleas, charge reductions, immunity, and lenient sentence recommendations that occur between prosecution and defense attorneys in the process commonly referred to as plea bargaining. Instead, it is concerned with the bargaining which occurs at the sentencing hearing between the judge and the defense when the judge indicates to the defendant either implicitly or explicitly that the length of his sentence will vary according to the extent of his cooperation in divulging information to government officials.

8. *E.g.*, *United States v. Roberts*, 600 F.2d 815, 819 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); *United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1085 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975); pt. II *infra*; see *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979).

9. Consideration of a defendant's refusal to inform has been attacked as not being reasonably related to a defendant's potential for rehabilitation. See pt. III *infra*. Compare *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979) with *United States v. Miller*, 589 F.2d 1117, 1139 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

10. *United States v. Grayson*, 438 U.S. 41, 46 (1978); A. Campbell, *Law of Sentencing* § 2, at 9 (1978); *Questionable Support*, *supra* note 3, at 407; 17 Duq. L. Rev. 521, 525-26 (1979).

11. *United States v. Grayson*, 438 U.S. 41, 45 (1978); see 4 W. Blackstone, *Commentaries* \*12.

12. A. Campbell, *supra* note 10, § 2, at 9; Task Force, *supra* note 1, at 83.

13. A. Campbell, *supra* note 10, § 2, at 11; Task Force, *supra* note 1, at 86. The effectiveness of

phy of sentencing operates on the premise that "the punishment should fit the offender and not merely the crime."<sup>14</sup> The principal result of this transformation has been the development of the indeterminate sentence.<sup>15</sup> In an indeterminate sentencing system, the sentencing judge predicts the defendant's rehabilitative potential.<sup>16</sup> Then, guided by statutory minimum and maximum penalties for particular crimes,<sup>17</sup> the judge attempts to impose a sentence that will enable the defendant to realize this potential.<sup>18</sup> The degree of punish-

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rehabilitation has come under increasing attack. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 425 (1974) (Marshall, J., concurring); Menninger & Menninger, *The Senselessness of Sentencing*, 14 Washburn L.J. 241 (1975) (arguing that the present criminal justice system is not designed to rehabilitate).

14. *United States v. Grayson*, 438 U.S. 41, 45 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

15. A. Campbell, *supra* note 10, §§ 25-30, at 95-110; Task Force, *supra* note 1, at 11-14. See generally Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. Am. Inst. Crim. L. & Criminology 9 (1925). In *Williams v. New York*, 337 U.S. 241 (1949), the Supreme Court approved indeterminate sentencing, noting that "[t]oday's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences . . . have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 248 (footnotes omitted).

16. *Williams v. New York*, 337 U.S. 241, 247-48 & n.13 (1949).

17. E.g., 18 U.S.C. §§ 113 (assault with intent to commit murder is punishable by imprisonment for "not more than twenty years"), 1072 (concealing an escaped prisoner is punishable by imprisonment for "not more than three years"), 1111 (second degree murder is punishable by imprisonment "for any term of years or for life"), 2031 (rape is punishable by "death, or imprisonment for any term of years or for life") (1976).

18. These broad statutory sentencing provisions afford judges little guidance. There is, however, a limited amount of case law to guide the judge. For examples of factors that a sentencing judge may consider, see *Williams v. New York*, 337 U.S. 241, 244 (1949) (number of past arrests); *United States v. Cardi*, 519 F.2d 309, 314 n.3 (7th Cir. 1975) (number of past charges ending in acquittal); *United States v. Dent*, 477 F.2d 447, 449 (D.C. Cir. 1973) (reckless nature of the defendant's behavior); *United States v. Metz*, 470 F.2d 1140, 1141 (3d Cir. 1972) (pending indictments), *cert. denied*, 411 U.S. 919 (1973); *United States v. Carden*, 428 F.2d 1116, 1118 (8th Cir. 1970) (the age, health and family situation of the defendant). The proposed Criminal Code Reform Act of 1979 sets forth specific objectives, policies and guidelines for federal judges to follow during sentencing. The bill, however, will probably not solve the problem discussed herein because its standards still allow the sentencing judge broad discretion. See S. 1722, 96th Cong., 1st Sess. §§ 101(b), 2003 (1979) (available from U.S. Government Printing Office). The judge is also subject to some constitutional restrictions. See, e.g., *United States v. Tucker*, 404 U.S. 443 (1972) (sentencing judge may not consider convictions obtained in violation of the defendant's constitutional rights); *Townsend v. Burke*, 334 U.S. 736 (1948) (sentence based on a materially false foundation vacated because the defendant did not have legal counsel); *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968) (unconstitutionally obtained evidence may not be considered in sentencing), *cert. denied*, 402 U.S. 961 (1971). See also 28 U.S.C. § 2255 (1976), which provides that a federal court may vacate, set aside or correct a sentence that was imposed in violation of the Constitution or laws of the United States or is otherwise subject to collateral attack. It is often difficult to identify the factors employed by a sentencing judge because he usually is not required to state the reasons for his sentencing decision. *Dorszynski v. United States*, 418 U.S. 424, 431, 456 (1974). But see *United States v.*

ment, therefore, is no longer automatic, but requires a discretionary assessment of the defendant's character.<sup>19</sup>

In exercising his broad discretion, the sentencing judge is presented with the practical problem of how "rationally to make the required [character analysis] so as to avoid capricious and arbitrary sentences [which the indeterminate sentence places] within the realm of possibility."<sup>20</sup> One solution is for the judge to acquire as much information as possible concerning both the crime with which the defendant has been charged and the defendant's character, propensities, present purposes and criminal tendencies.<sup>21</sup> Consequently, sentencing judges usually receive a presentence report that reflects the results of a professional investigation into the defendant's background.<sup>22</sup> The judge, however, is not limited to using this information.<sup>23</sup> He may also conduct an independent investigation and may consider almost any relevant information, regardless of its source.<sup>24</sup> One factor often considered by the sentencing judge is the extent of the defendant's cooperation with government authorities.<sup>25</sup>

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Rosner, 549 F.2d 259, 264 (2d Cir.) (judges should state reasons for a particular sentence), *cert. denied*, 434 U.S. 826 (1977). Furthermore, even if the sentencing judge states the reasons for his decision, the appellate court will probably be reluctant to vacate the sentence if it is within the statutory guidelines. *See, e.g.*, United States v. Foss, 501 F.2d 522, 527 (1st Cir. 1974); United States v. Weiner, 418 F.2d 849, 851 (5th Cir. 1969). For a discussion of the origins of and the reasons underlying this reluctance to review sentences, see Note, *Appellate Review of Criminal Sentences—The Backdoor Approach*, 44 Brooklyn L. Rev. 975 (1978).

19. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961) (modern sentencing procedure requires "a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done").

20. United States v. Grayson, 438 U.S. 41, 48 (1978).

21. *Id.* (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)); ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 2.2, at 14 (Tentative Draft 1967).

22. United States v. Grayson, 438 U.S. 41, 48 (1978). Probation officers usually conduct the investigation into the defendant's background. A. Campbell, *supra* note 10, § 100, at 315. The Federal Rules of Criminal Procedure require that the report "contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." Fed. R. Crim. P. 32(c)(2).

23. United States v. Grayson, 438 U.S. 41, 50 (1978).

24. *Id.* (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)). Congress has reaffirmed this principle by enacting 18 U.S.C. § 3577 (1976), which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

25. *E.g.*, United States v. Barnes, 604 F.2d 121, 154 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3179 (U.S. Aug. 17, 1979) (No. 79-261); United States v. Roberts, 600 F.2d 815, 823 app. (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979); United States v. Miller, 589 F.2d 1117, 1137 n.18 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); United States v. Williams, 579 F.2d 369, 370 & n.2 (5th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. Ramos, 572 F.2d 360, 361 (2d Cir. 1978); United States v.

Government officials often ask a defendant to divulge specific information that will assist them in their law enforcement efforts.<sup>26</sup> When the sentencing judge learns of the government's request for cooperation, he may indicate to the defendant that the length of his sentence will be affected by the nature of his response.<sup>27</sup> The judge may then simply announce the sentence without expressly seeking a change of heart from an uncooperative defendant.<sup>28</sup> Occasionally, however, the judge specifically invites the defendant to reconsider his position before sentence is imposed<sup>29</sup> or to move for a reduction of sentence if he chooses to cooperate in the future.<sup>30</sup> In either

Garcia, 544 F.2d 681, 682-83 (3d Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1084-85 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Acosta*, 501 F.2d 1330, 1337 & n.8 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975); *United States v. Hayward*, 471 F.2d 388, 390 (7th Cir. 1972); *United States v. Chaidez-Castro*, 430 F.2d 766, 770-71 (7th Cir. 1970); *see In re Grand Jury Proceedings*, 509 F.2d 1349, 1351 (5th Cir. 1975); *United States v. McCord*, 509 F.2d 334, 346 n.35 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); *United States v. Sweig*, 454 F.2d 181, 182 & n.2 (2d Cir. 1972); *United States v. Vermeulen*, 436 F.2d 72, 74 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); *United States v. Liddy*, 397 F. Supp. 947, 950 (D.D.C. 1975), *aff'd without opinion*, 530 F.2d 1094 (D.C. Cir.), *cert. denied*, 426 U.S. 937 (1976); *United States v. Mitchell*, 377 F. Supp. 1312 (D.D.C.), *aff'd sub nom. Mitchell v. Sirica*, 502 F.2d 375, 384 & n.17 (D.C. Cir.), *cert. denied*, 418 U.S. 955 (1974).

26. *E.g.*, *United States v. Roberts*, 600 F.2d 815, 821 app. (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979) (defendant asked to testify against drug suppliers).

27. *E.g.*, *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979); *United States v. Rogers*, 504 F.2d 1079, 1084 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975); *United States v. Sweig*, 454 F.2d 181, 182 n.2 (2d Cir. 1972); *United States v. Chaidez-Castro*, 430 F.2d 766, 770 (7th Cir. 1970). Usually the prosecution specifically brings the defendant's noncooperation to the judge's attention during the sentencing hearing, although occasionally the judge is the first to suggest cooperation to the defendant. *See, e.g.*, *United States v. Williams*, 579 F.2d 369, 370 (5th Cir.), *cert. denied*, 439 U.S. 936 (1978).

28. *United States v. Roberts*, 600 F.2d 815, 823 app. (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); *United States v. Miller*, 589 F.2d 1117, 1137 n.18 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). Once the judge indicates that cooperation is a factor, he is bargaining with the defendant, albeit implicitly, because the defendant will be told or knows that he can move for a reduction of sentence under Federal Rule of Criminal Procedure 35 if he decides to cooperate in the future. *See Fed. R. Crim. P. 35; cf. Alschuler, The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 Colum. L. Rev. 1059, 1076-87 (1976) [hereinafter cited as *Trial Judge's Role*] (discussing systems of implicit judicial plea bargaining).

29. *E.g.*, *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting) (court recessed sentencing hearing to give the defendant the opportunity to cooperate), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975); *United States v. Chaidez-Castro*, 430 F.2d 766, 770 (7th Cir. 1970) (same).

30. *E.g.*, *United States v. Williams*, 579 F.2d 369, 370 (5th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. Garcia*, 544 F.2d 681, 683 (3d Cir. 1976); *United States v. Sweig*, 454 F.2d 181, 182 (2d Cir. 1972); *United States v. Vermeulen*, 436 F.2d 72, 74-75 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971). When the judge announces that cooperation is a factor and explicitly invites a change of heart, immediately or prior to a motion for reduction of sentence, he is clearly bargaining with the defendant. *Cf. Trial Judge's Role, supra* note 28, at 1087-91 (discussing systems of forthright judicial plea bargaining).

situation, once the defendant's failure to cooperate becomes a major factor in the sentence decision, the sentencing hearing is transformed into a bargaining process between judge and defendant.<sup>31</sup>

The decisions of the federal courts of appeals in cases in which sentence bargaining is challenged offer a variety of rationales for upholding or rejecting the practice as well as a plethora of inconsistent conclusions.<sup>32</sup> The Seventh Circuit, for example, has frequently refused to vacate such sentences on the ground that the judge's consideration of the defendant's cooperation was not an abuse of his discretion.<sup>33</sup> It has held that such behavior is a proper attempt to individualize the defendant's sentence<sup>34</sup> and that appellate intervention in the sentencing process should be avoided unless the sentence exceeds the statutory guidelines.<sup>35</sup>

In *United States v. Vermeulen*,<sup>36</sup> a panel of the Second Circuit also upheld a sentence imposed after a judicial request for cooperation.<sup>37</sup> Immediately prior to sentencing, the court sought information from the defendant as to why he had entered the United States on previous occasions under fictional identities.<sup>38</sup> When the defendant refused to cooperate, the sentencing judge stated that "[m]aybe if he is put away for a little more . . . he might find some way of cooperating and he might be able to get some help in the reduction of any term that he may be sent up for."<sup>39</sup> Despite this express indication that the defendant's noncooperation was a factor in his sentence, the appellate court held that the trial judge had not put a "price tag" on the defendant's privilege against self-incrimination.<sup>40</sup> Instead, the court found, the judge had

31. See *United States v. Roberts*, 600 F.2d 815, 819 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting) (judge's consideration of defendant's failure to cooperate presented a "bargain-versus-retaliation option"), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793).

32. Compare *DiGiovanni v. United States*, 596 F.2d 74, 74 (2d Cir. 1979) (impermissible factor); *United States v. Garcia*, 544 F.2d 681, 685 (3d Cir. 1976) (same) and *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting) (same), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975) with *United States v. Barnes*, 604 F.2d 121, 154 (2d Cir. 1979) (permissible factor), *petition for cert. filed*, 48 U.S.L.W. 3179 (U.S. Aug. 17, 1979) (No. 79-261); *United States v. Miller*, 589 F.2d 1117, 1139 (1st Cir. 1978) (same), *cert. denied*, 440 U.S. 958 (1979); *United States v. Williams*, 579 F.2d 369, 371 (5th Cir.) (same), *cert. denied*, 439 U.S. 936 (1978) and *United States v. Hayward*, 471 F.2d 388, 391 (7th Cir. 1972) (same).

33. E.g., *United States v. Hayward*, 471 F.2d 388, 391 (7th Cir. 1972); *United States v. Chaidez-Castro*, 430 F.2d 766, 771 (7th Cir. 1970); see *United States v. Barnes*, 604 F.2d 121, 154 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3179 (U.S. Aug. 17, 1979) (No. 79-261).

34. *United States v. Hayward*, 471 F.2d 388, 391 (7th Cir. 1972); see *United States v. Barnes*, 604 F.2d 121, 153-54 (2d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3179 (U.S. Aug. 17, 1979) (No. 79-261); *United States v. Chaidez-Castro*, 430 F.2d 766, 770-71 (7th Cir. 1970).

35. *United States v. Chaidez-Castro*, 430 F.2d 766, 770-71 (7th Cir. 1970).

36. 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

37. *Id.* at 75-76.

38. *Id.* at 75.

39. *Id.* at 77 n.13; see *United States v. Williams*, 579 F.2d 369, 370 & n.2 (5th Cir.) (in response to judge's inquiry, prosecution stated that the defendant had not volunteered and had not been asked to cooperate although his cooperation would be helpful, but not essential; judge then stated that the defendant's cooperation might be a relevant consideration in ruling on a motion to reduce the sentence), *cert. denied*, 439 U.S. 936 (1978); *United States v. Sweig*, 454 F.2d 181, 182 n.2 (2d Cir. 1972).

40. 436 F.2d at 76-77 (court noted that the appellant was asked to divulge information about

merely *suggested* that future cooperation might warrant a reduction in sentence.<sup>41</sup>

A significant number of appellate courts, on the other hand, most notably panels in the Third and Fifth Circuits, have declared that judicial sentence bargaining is violative of the fifth amendment.<sup>42</sup> In light of the facts of the particular case,<sup>43</sup> these courts have found that the sentencing judge placed an unconstitutional condition on the defendant's exercise of his right not to incriminate himself by varying the length of his sentence according to his willingness to divulge information. In reaching their conclusion, the panels emphasized the unconstitutionality of compelling a defendant either to remain silent and risk receiving a harsher sentence or to cooperate and risk being prosecuted for other crimes.<sup>44</sup>

A second rationale used to vacate sentences imposed after judicial requests for cooperation is that a defendant's refusal to cooperate is not a reliable indication of his potential for rehabilitation.<sup>45</sup> This view was recently adopted by a Second Circuit panel in *DiGiovanni v. United States*.<sup>46</sup> In *DiGiovanni*, the defendant refused to cooperate with the government by testifying against his former confederates.<sup>47</sup> On appeal, the court questioned the propriety of inferring a lack of rehabilitative potential from a defendant's refusal to

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others; if he felt that he would incriminate himself by cooperating, he should have asserted his fifth amendment privilege); see *United States v. Sweig*, 454 F.2d 181, 182-83 (2d Cir. 1972). Compare *United States v. Acosta*, 501 F.2d 1330, 1337-33 (5th Cir. 1974) (Gee, J., dissenting) (defendant could not reveal his drug sources without at least tacitly admitting his own guilt), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975) with *United States v. Hayward*, 471 F.2d 388, 390 (7th Cir. 1972) (defendant would not have been admitting guilt by giving the government the name of the person from whom he received goods found in his garage because it had been stipulated that they were stolen merchandise).

41. 436 F.2d at 77; see *United States v. Williams*, 579 F.2d 369, 370 (5th Cir.), *cert. denied*, 439 U.S. 936 (1978); *United States v. Sweig*, 454 F.2d 181, 182 (2d Cir. 1972).

42. E.g., *United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1085 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975). But see *United States v. Vermeulen*, 436 F.2d 72, 76-77 (2d Cir. 1970) (judge indicated that if a defendant believes that his cooperation will implicate him in additional crimes, he must explicitly assert his fifth amendment right to remain silent before the court will take notice of his predicament), *cert. denied*, 402 U.S. 911 (1971). See also *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979).

43. In order for there to be a violation of a person's fifth amendment privilege, the information that he is asked to divulge must incriminate him. See note 55 *infra* and accompanying text.

44. *United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976); *United States v. Rogers*, 504 F.2d 1079, 1085 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975).

45. *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979); see *United States v. Roberts*, 600 F.2d 815, 816-17 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793).

46. 596 F.2d 74 (2d Cir. 1979).

47. *Id.* at 75. It was possible, however, that in testifying against his confederates, the defendant might have incriminated himself. See note 40 *supra*.



testify.<sup>48</sup> It found that motivations unrelated to the defendant's desire to reform, such as fear of reprisals, often underlie a defendant's unwillingness or refusal to testify.<sup>49</sup> In addition, the court reasoned that if a judge is allowed to infer a lack of desire to reform from a defendant's refusal to testify, the fifth amendment proscription against compulsory self-incrimination would be undercut.<sup>50</sup>

The foregoing cases and theories illustrate the complexities involved in the judicial sentence bargaining issue. It is a situation in which the government's desire to prosecute crime efficiently and the defendant's constitutional rights are certainly on a "collision course."<sup>51</sup> Resolution of the sentence bargaining issue, therefore, is critical to the fair administration of criminal justice.<sup>52</sup>

## II. THE CONSTITUTIONALITY OF JUDICIAL SENTENCE BARGAINING

In judicial sentence bargaining, the defendant is encouraged to comply with government requests to divulge information about his activities, or those of third parties, without a grant of immunity. The practice, therefore, may violate the defendant's fifth amendment privilege against compulsory self-incrimination.<sup>53</sup> That privilege is infringed during the sentencing hearing<sup>54</sup> if two principal conditions are met. The defendant must be asked to give information that may incriminate him in criminal activity,<sup>55</sup> and the imposi-

48. 596 F.2d at 75.

49. *Id. Contra*, United States v. Miller, 589 F.2d 1117, 1139 (1st Cir. 1978) (defendant's failure to cooperate is relevant in assessing his rehabilitative potential), *cert. denied*, 440 U.S. 958 (1979).

50. 596 F.2d at 75. It has been argued that if the judge does not consider the defendant's willingness to cooperate, then this factor will be given greater weight by the prosecutor. *See* United States v. Roberts, 600 F.2d 815, 824 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (separate statement of MacKinnon, J.), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793). Judge Bazelon contends, however, that if the judge can consider the defendant's unwillingness to cooperate the defendant will receive harsher treatment twice, once by the prosecutor and once by the judge. *Id.* at 818 n.12 (Bazelon, J., dissenting).

51. United States v. Garcia, 544 F.2d 681, 682 (3d Cir. 1976).

52. United States v. Roberts, 600 F.2d 815, 816 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793).

53. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself").

54. *See* Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentencing"). Although the fifth amendment expressly refers to criminal cases, the Supreme Court has found that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 49 (1967). In fact, the privilege has not been limited to criminal trials but has been extended to other proceedings in which a person's answers might be used against him in subsequent criminal proceedings. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 460-61, 465 (1966) (police custodial interrogations); Emspak v. United States, 349 U.S. 190, 198-201 (1955) (legislative committee hearings); ICC v. Brimson, 154 U.S. 447, 478-80 (1894) (investigations by administrative officials); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892) (grand jury).

55. Hoffman v. United States, 341 U.S. 479, 486-87 (1951). A person may only assert the privilege if he risks a criminal conviction by breaking his silence. *Id.*; *see* Ullmann v. United States, 350 U.S. 422, 438-39 (1956) (privilege unavailable if immunity granted). A defendant who has not pleaded guilty may assert the privilege because he is not finally and irrevocably adjudged

tion of the enhanced sentence for refusing to cooperate must constitute compulsion within the meaning of the fifth amendment.<sup>56</sup>

A finding of compulsion in government procedures, according to the Supreme Court, should be based on a balancing of several factors. In *McGautha v. California*,<sup>57</sup> the Court considered the constitutionality of Ohio's sentencing procedure in which the jury determined the defendant's guilt and his sentence in the same proceeding.<sup>58</sup> The defendant contended that this unitary proceeding infringed his right against self-incrimination because he could remain silent on the issue of his guilt only at the cost of surrendering the chance to plead his case on the issue of punishment.<sup>59</sup> The Court found that "[a]lthough a defendant may . . . follow whichever course he chooses, the Constitution does not . . . always forbid requiring him to choose."<sup>60</sup> Thus, according to the Court, the threshold inquiry is whether by forcing the defendant to choose the government "impairs to an appreciable extent any of the policies [underlying] the rights involved."<sup>61</sup> The Court reaffirmed the validity of the *McGautha* test two years later in *Chaffin v. Stynchcombe*.<sup>62</sup> In *Chaffin*, the defendant challenged Georgia's practice of allowing a jury upon retrial of an indictment to impose a harsher sentence for the same crime.<sup>63</sup> The Court first found that the resentencing procedure used by the government was "a legitimate practice," compatible with modern notions of criminal sentencing.<sup>64</sup> It then concluded that requiring the defendant to choose between risking a harsher sentence on retrial or waiving his right to challenge the first conviction did not place an unconstitutional burden on those rights.<sup>65</sup> Taken together, *McGautha* and *Chaffin* indicate that a finding of compulsion under the fifth amendment must be made by balancing three factors:<sup>66</sup> (1) the

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guilty until he has exhausted his post-conviction remedies, such as moving for a new trial or filing an appeal or a petition for certiorari. *Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966). Thus, a defendant incurs a tangible loss if he admits guilt while divulging information solicited by the prosecutor and the judge during sentencing. *Id.* The defendant who pleads guilty, on the other hand, waives his constitutional privilege against compulsory self-incrimination, but only to the extent that the information sought relates to the activities encompassed in his plea. *See* *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *United States v. Sanchez*, 459 F.2d 100, 103 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). *But see* *United States v. Houghton*, 554 F.2d 1219, 1222 (1st Cir.) (witness did not have to testify "until after he was sentenced"), *cert. denied*, 434 U.S. 851 (1977); Brief for Petitioner at 10-11, *Roberts v. United States*, No. 78-1793 (U.S., *cert. granted* Oct. 1, 1979) (defendant who pleads guilty may assert the fifth amendment privilege against self-incrimination at the sentencing hearing).

56. *Cf.* *Garrity v. New Jersey*, 385 U.S. 493, 496-98 (1967) (choice between forfeiting job and incriminating oneself constitutes compulsion within the meaning of the fifth amendment).

57. 402 U.S. 183 (1971), *vacated sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972) (*vacated* insofar as opinion affirmed imposition of death penalty).

58. *Id.* at 210-11.

59. *Id.* at 211.

60. *Id.* at 213.

61. *Id.*

62. 412 U.S. 17, 31-32 (1973).

63. *Id.* at 19-20.

64. *Id.* at 21-22, 32 & n.20.

65. *Id.* at 32-33, 35 (petitioner was not "chilled" in exercising his right to appeal by possibility of a harsher sentence).

66. *See generally* *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-09 (1977); *Lefkowitz v.*

extent to which the policies behind the fifth amendment are impaired; (2) the nature of the benefit denied or the penalty exacted<sup>67</sup> for exercising the constitutional right;<sup>68</sup> and (3) the strength and nature of the government's interest in maintaining the challenged practice.<sup>69</sup>

A. *Impairment of the Policies Underlying the Privilege Against Self-Incrimination*

The common law privilege against self-incrimination, as it existed in 1789, sought primarily to protect citizens from inquisitorial interrogations and to force prosecutors to uncover independent proof of guilt or innocence rather than to rely upon compulsory self-disclosure by the accused.<sup>70</sup> Although there is a dearth of legislative history concerning the framing of the fifth amendment,<sup>71</sup> it is now firmly established that its proscription of compulsory self-incrimination was intended to incorporate the common law policies.<sup>72</sup>

Turley, 414 U.S. 70, 77-85 (1973); Comment, *Guilty Pleas and the Criminal Process: Encouragement or Coercion?*, 48 Cin. L. Rev. 567 (1979); Comment, *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144 (1968) [hereinafter cited as *Unconstitutional Conditions*].

67. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 33-35 (1973); *McGautha v. California*, 402 U.S. 183, 211 (1971), *vacated sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972) (vacated insofar as opinion affirmed imposition of death penalty). A person is penalized for exercising his constitutional rights if a benefit that otherwise would be available to him is withheld. *Unconstitutional Conditions*, *supra* note 66, at 174.

68. The more important a benefit is to an individual, the greater is the compulsion involved in denying that benefit to him for exercising or refusing to waive his constitutional rights. *Unconstitutional Conditions*, *supra* note 66, at 154.

69. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 21-22, 32 & n.20 (1973). "Even though there is a recognizably detrimental effect on [the assertion of] constitutional rights, when a concrete state interest exists the use of a balancing test is inescapable." *Unconstitutional Conditions*, *supra* note 66, at 156.

70. 1 J. Stephen, *A History of the Criminal Law of England* 440-42 (1883); 8 J. Wigmore, *Evidence* § 2251 (rev. ed. J. McNaughton 1961). The privilege was also concerned with discouraging government officials from using torture and questioning citizens on the basis of mere suspicion. *Id.* at 315; see J. Stephen, *supra*, at 511 (illustrating the inquisitorial system of procedure). See generally *Andresen v. Maryland*, 427 U.S. 463, 470-71 (1976); *Garner v. United States*, 424 U.S. 648, 655-56 (1976); *Michigan v. Tucker*, 417 U.S. 433, 439-40 (1974); *Johnson v. New Jersey*, 384 U.S. 719, 729-30 (1966); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); *Ullmann v. United States*, 350 U.S. 422, 428 (1956). The Supreme Court has also noted that the privilege implicates traditional notions of privacy. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

71. The Bill of Rights was the product of efforts to solidify support for the new federal government. See generally E. Dumbauld, *The Bill of Rights and What It Means Today* (1957); L. Levy, *Origins of the Fifth Amendment* (1968). The amendments were essentially a composite of grievances expressed in newspapers, debates in state legislatures, recommendations of state ratifying conventions, and provisions in various state constitutions. *Id.* at 422. The responsibility for drafting the Bill of Rights and procuring its approval by the first Congress was delegated almost solely to James Madison. *Id.* at 421-22. In presenting the amendments to Congress, however, Madison did not reveal his intentions regarding the self-incrimination clause, and his papers and correspondence do not illuminate the subject. *Id.* at 423. Moreover, Congress also neglected to discuss the clause before it presented the amendment to the states for ratification. E. Dumbauld, *supra*, at 206-16; L. Levy, *supra*, at 424-25.

72. L. Levy, *supra* note 71, at 405, 423, 430; see *Andresen v. Maryland*, 427 U.S. 463, 470-71 (1976); *Garner v. United States*, 424 U.S. 648, 655-56 (1976); *Michigan v. Tucker*, 417 U.S. 433,

Thus, it is against these policies that the constitutional validity of judicial sentence bargaining must be measured.

The inquisitorial system of justice that existed in England prior to the recognition of the privilege required suspected criminals to swear to an oath and to submit to an interrogation without knowledge of the charges and evidence against them or the identity of their accusers.<sup>73</sup> The suspect's statements could be used against him in the underlying prosecution or, if he lied, could form the basis of a prosecution for perjury.<sup>74</sup> If the suspect refused to take the oath he could be held in contempt and imprisoned until he complied.<sup>75</sup>

Judicial sentence bargaining simulates such an inquisitorial system of criminal justice. Like the victim of an inquisition, the defendant's alternatives are either to risk disclosing information that may support a criminal indictment against him or to suffer additional confinement.<sup>76</sup> If the defendant refuses to cooperate, he receives a longer sentence for the crimes for which he has already been convicted than he would receive if he cooperated. Moreover, the modern defendant is usually unaware of the exact nature and scope of the criminal prosecution that may result from his statements. He is ignorant of the evidence amassed by the prosecutor in connection with the criminal activities that he is being asked to discuss, as well as the identity of those persons who may have alerted the authorities to the crime.<sup>77</sup> By requiring the defendant to speak or to suffer the consequences, therefore, judicial sentence bargaining undercuts the self-incrimination clause's objective of maintaining an accusatorial or adversarial system of criminal justice.<sup>78</sup>

Judicial sentence bargaining is also inconsistent with the fifth amendment's objective of discouraging reliance upon evidence obtained from the defendant himself.<sup>79</sup> The salutary effects of this policy are twofold. First, it maintains

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439-40 (1974); *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); *Ullmann v. United States*, 350 U.S. 422, 428 (1956); 8 J. Wigmore, *supra* note 70, § 2251; *cf. Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1954) ("Our forefathers, when they wrote [the self-incrimination] provision into the . . . Constitution, had in mind a lot of history which has been largely forgotten to-day").

73. L. Levy, *supra* note 71, at 23-24; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 5-6 (1930); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 1 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 770 (1935).

74. L. Levy, *supra* note 71, at 23-24; Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn. L. Rev. 383, 385-86 (1977).

75. Pittman, *supra* note 73, at 771; Ritchie, *supra* note 74, at 385-86.

76. If the defendant informs, he may be admitting guilt to the crime for which he is being sentenced. The admission might then cause him to lose any post-conviction remedies that he may have. See note 6 *supra*.

77. See *Rovario v. United States*, 353 U.S. 53, 59 (1957) (government privilege to withhold informer's identity); 8 J. Wigmore, *supra* note 70, § 2374.

78. The absence of the common law oath and contempt citation does not undermine the application of the privilege in judicial sentence bargaining. Rather, the judge's ability to increase the sentence is the tool used to compel the defendant's testimony without his knowledge of its implications.

79. See E. Griswold, *The Fifth Amendment Today* 8 (1955); 8 J. Wigmore, *supra* note 70, § 2251; McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, 51 J. Crim. L.C. & P.S. 138, 144 (1960).

the integrity of our system of justice by discouraging the unseemly practices in which law enforcement officials have historically engaged when they have been authorized to compel testimony.<sup>80</sup> Second, it stimulates prosecutors to uncover independent evidence of the suspect's guilt or innocence.<sup>81</sup> Without an independent search, the quality of proof at trial is diminished. Consequently, there is a concomitant increase in the risk of an erroneous conviction and a decrease in the public's confidence in the criminal justice system.<sup>82</sup>

By enabling prosecutors to rely upon judicial coercion as a means of obtaining evidence, judicial sentence bargaining is even more disturbing than the prosecutorial practices that inspired the privilege because the coercion is now administered by a judge. The legitimacy of our system of justice is premised in part on the notion of an impartial judge.<sup>83</sup> In joining with the prosecutor to obtain evidence, the sentencing judge jeopardizes his role as an impartial arbiter,<sup>84</sup> thereby undermining the integrity of the criminal justice system.

### B. *The Penalty Exacted*

Judicial sentence bargaining necessarily threatens a noncooperating defendant with a penalty. He risks a greater loss of liberty for exercising his right to remain silent than he might otherwise incur if the degree of his cooperation was divorced from the sentence imposed.<sup>85</sup> The Supreme Court has declared unconstitutional the imposition of sanctions less severe than a loss of individual liberty for exercising the right to remain silent. For example, the Supreme Court has held that the imposition of various *civil* sanctions on individuals,

80. *Garner v. United States*, 424 U.S. 648, 655-56 (1976); 1 J. Stephen, *supra* note 70, at 441; 8 J. Wigmore, *supra* note 70, § 2251; Clapp, *Privilege Against Self-Incrimination*, 10 Rutgers L. Rev. 541, 543 (1956); *see, e.g.*, *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (per curiam) (policeman threatened defendant at gunpoint in effort to secure confession).

81. 8 J. Wigmore, *supra* note 70, § 2251; *see Garner v. United States*, 424 U.S. 648, 655-56 (1976).

82. *See* 8 J. Wigmore, *supra* note 70, § 2251.

83. *United States v. Roberts*, 600 F.2d 815, 817 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793).

84. *Id.* at 817-19 (impartial trial judge may be tempted to join with prosecutor "under the guise of exercising discretion in sentencing").

85. *See, e.g.*, *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974) (Gee, J., dissenting), *aff'd in part, vacated in part*, 509 F.2d 539 (5th Cir.) (en banc) (per curiam) (judgment affirmed; sentence vacated), *cert. denied*, 423 U.S. 891 (1975). Judicial sentence bargaining cannot be justified on the grounds that rather than penalizing a defendant for remaining silent, the judge is simply rewarding defendants who cooperate. The distinction is illusory because whether the reward is withheld or the penalty imposed, failure to cooperate will result in a more severe sentence than would have been imposed if the defendant had cooperated. *See United States v. Roberts*, 600 F.2d 815, 824 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (separate statement of MacKinnon, J.), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); *cf.* Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L. J. 204, 219-20 (1956) [hereinafter cited as *Defendant's Plea*] (referring to plea bargaining). Nevertheless, some courts allow the judge to consider the defendant's cooperation, but not his failure to cooperate, in sentencing. *See, e.g.*, *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979).

pursuant to statute<sup>86</sup> or court order,<sup>87</sup> because of refusal to testify, to waive immunity or to produce documents violates the self-incrimination clause.<sup>88</sup> It has stated that a person has a right to remain silent "unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."<sup>89</sup> The threat of a civil sanction for remaining silent, according to the Court, makes the assertion of the fifth amendment privilege "costly" and therefore constitutes an impermissible burden on the individual's exercise of his constitutional right.<sup>90</sup> Similarly, in *Griffin v. California*,<sup>91</sup> a state prosecutor had commented adversely during trial on the defendant's failure to testify on his own behalf.<sup>92</sup> It was, of course, possible that the jury might subconsciously have drawn an adverse inference in the absence of such remarks.<sup>93</sup> Nevertheless, the Supreme Court reversed the conviction, holding that allowing the government to comment on the defendant's refusal to testify resulted in "a penalty imposed by courts for exercising a constitutional privilege."<sup>94</sup> The effect of the remarks was to penalize the defendant by using his exercise of the privilege against self-incrimination to, in fact, incriminate him.<sup>95</sup>

Despite these prior decisions, the Court, in *Baxter v. Palmigiano*,<sup>96</sup> upheld a prison disciplinary board's consideration of a prisoner's refusal to testify on his own behalf as evidence of the prisoner's guilt.<sup>97</sup> If found guilty before the board, the prisoner in *Baxter* faced a prolonged period of isolation.<sup>98</sup> The Court held that the disciplinary proceeding was not a "criminal case," and that therefore the evidentiary rules designed to protect the privilege in criminal cases were inapplicable.<sup>99</sup> It also noted that, on the facts of the case, the adverse inference drawn from the prisoner's refusal to testify was only considered in addition to other substantial evidence of guilt.<sup>100</sup>

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86. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 802 & n.1 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 71-73 & n.1 (1973); *Uniformed Sanitation Men Ass'n, v. Commissioner of Sanitation*, 392 U.S. 280, 281 n.1 (1968); *Gardner v. Broderick*, 392 U.S. 273, 275 n.3 (1968).

87. *Spevack v. Klein*, 385 U.S. 511, 513 (1967) (plurality opinion).

88. E.g., *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977) (loss of unsalaried elective political positions); *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (disqualification from contracting with official agencies); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968) (loss of job); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (same); *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (plurality opinion) (disbarment).

89. *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (plurality opinion) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

90. See, e.g., *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967) (plurality opinion).

91. 380 U.S. 609 (1965).

92. *Id.* at 610-11.

93. *Id.* at 620-21 (Stewart, J., dissenting) (comment by government counsel does not result in compulsion because the jury is likely to draw the adverse inference without any comment).

94. *Id.* at 614.

95. *Id.* (comment on a defendant's refusal to testify "cuts down on the privilege by making its assertion costly").

96. 425 U.S. 308 (1976).

97. *Id.* at 318-19.

98. *Id.* at 311 (prisoner faced 30 days of punitive segregation).

99. *Id.* at 316-19.

100. *Id.* at 317-18.

*Baxter* is distinguishable from the cases involving judicial sentence bargaining on three grounds. First, unlike the disciplinary proceeding in *Baxter*, the sentence hearing is a criminal case within the meaning of the fifth amendment, entitling the defendant to the protection of the self-incrimination clause.<sup>101</sup> Second, the *Baxter* Court was primarily concerned with the need to vest prison officials with broad discretion in disciplinary matters for the purpose of maintaining order in prisons.<sup>102</sup> This concern is irrelevant in considering the propriety of judicial sentence bargaining. Finally, and most important, the disciplinary board considered the prisoner's silence in *Baxter* in addition to other substantial evidence in reaching a decision on guilt or innocence.<sup>103</sup> Although in a sentence bargaining situation the defendant's failure to cooperate is considered along with other character evidence, the judge is not faced with two alternative dispositions. He may choose any sentence within the statutory limits. The failure to cooperate, therefore, automatically adds an extra increment of time to the sentence for which the sole justification is the noncooperation itself.

### C. The Governmental Interest

Judicial sentence bargaining promotes the government's interest in obtaining information about criminal activities to protect society and to enforce the law.<sup>104</sup> Because most defendants will not cooperate voluntarily,<sup>105</sup> the government must be able to give defendants a benefit—in this situation a reduced sentence—in exchange for information.<sup>106</sup> In this regard, the practice is similar to plea bargaining, in which the accused who pleads guilty faces lesser or fewer charges or a more lenient sentence recommendation than the accused who refuses to plead guilty.<sup>107</sup>

Although plea bargaining and judicial sentence bargaining are similar in operation, the two concepts are in many respects distinct. In *Blackledge v. Allison*,<sup>108</sup> the Supreme Court upheld the validity of plea bargaining because it offers substantial advantages to both the government and the defendant.<sup>109</sup> The Court cited four principal advantages to the defendant: a speedier

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101. See note 54 *supra* and accompanying text.

102. *Baxter v. Palmigiano*, 425 U.S. 308, 320-28 (1976); see *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (imprisonment results in the loss of many rights and privileges, which is justified by considerations in our penal system).

103. 425 U.S. at 317-18.

104. The government is often unable to prosecute wrongdoers without the cooperation of an indicted criminal. See, e.g., *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979) (charges against two alleged narcotics dealers dropped when the defendant refused to testify against them).

105. See R. Dawson, Sentencing 96 (1969).

106. *Id.* See generally ABA Project on Standards for Criminal Justice, Pleas of Guilty § 1.8, at 8-9 (Approved Draft 1968) [hereinafter cited as Pleas of Guilty].

107. R. Dawson, *supra* note 105, at 96; see Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564, 580 (1977) [hereinafter cited as *Transformation of the Criminal Process*].

108. 431 U.S. 63 (1977).

109. *Id.* at 71; see *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Brady v. United States*, 397 U.S. 742, 752 (1970).

disposition of his case,<sup>110</sup> an opportunity to avoid possible pre-trial incarceration,<sup>111</sup> an opportunity to admit his guilt, thereby enabling him to promptly begin the process of rehabilitation,<sup>112</sup> and an opportunity to avoid the uncertainties of trial.<sup>113</sup> Plea bargaining may also result in a more lenient sentence for the defendant.<sup>114</sup> At the same time, when the government secures a guilty plea scarce judicial and prosecutorial resources are conserved,<sup>115</sup> the objectives of punishment are more effectively attained because punishment is imposed more quickly,<sup>116</sup> and society is protected from wrongdoers who otherwise might be freed on bail until the completion of the proceedings.<sup>117</sup>

The defendant involved in judicial sentence bargaining receives only one of the benefits that accrue to his counterpart who engages in plea bargaining. The single benefit available to him is the possibility of a reduced sentence. Yet even if the judge looks favorably on the informer's cooperation, it may play a minor role in the determination of sentence because of the wide latitude given sentencing judges<sup>118</sup> and the lack of determinable tests for rehabilitation.<sup>119</sup>

Judicial sentence bargaining, like plea bargaining, may contribute to the efficiency of the criminal justice system.<sup>120</sup> If the defendant chooses to cooperate, the police and prosecutor may save time investigating or prosecuting a crime.<sup>121</sup> In addition, the practice may serve to protect society because

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110. 431 U.S. at 71. If the defendant pleads guilty he avoids both the delay attendant upon waiting for trial and the time-consuming trial itself. *Cf. Barker v. Wingo*, 407 U.S. 514, 520-21 (1972) (problems of attendant delays).

111. 431 U.S. at 71. Moreover, the delay in court calendars increases the burden of pretrial detention on those defendants who cannot afford bail. *See Barker v. Wingo*, 407 U.S. 514, 520-21 (1972).

112. 431 U.S. at 71.

113. *Id.* The uncertainties of jury decisions make it virtually impossible for the defense to predict the outcome of a trial. *Transformation of the Criminal Process*, *supra* note 107, at 569-70.

114. *Defendant's Plea*, *supra* note 85, at 206-07.

115. 431 U.S. at 71. The defendant who pleads guilty saves valuable police, prosecutorial and judicial resources because the government is not required to prove guilt beyond a reasonable doubt in an adversarial trial. D. Newman, *supra* note 2, at 4; *Transformation of the Criminal Process*, *supra* note 107, at 566-67.

116. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 520 (1972); *Santobello v. New York*, 404 U.S. 257, 261 (1971); *Transformation of the Criminal Process*, *supra* note 107, at 567 n.23. *But cf.* A. von Hirsch, *Doing Justice: The Choice of Punishments* 11-18 (1976) (questioning the efficacy of rehabilitation theory); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 Buffalo L. Rev. 717, 753-56 (1972) [hereinafter cited as *Prediction of Criminal Conduct*] (arguing that treatment-oriented punishment is based on untrustworthy predictions of the offender's dangerousness).

117. *Blackledge v. Allison*, 431 U.S. at 71. Clogged court calendars result in such extensive trial delays that defendants, able to secure release pending trial, present a risk to the public of additional criminal activity. *Barker v. Wingo*, 407 U.S. 514, 520-21 (1972); *Transformation of the Criminal Process*, *supra* note 107, at 567.

118. *See* notes 16-20 *supra* and accompanying text.

119. *Transformation of the Criminal Process*, *supra* note 107, at 570; *see Prediction of Criminal Conduct*, *supra* note 116, at 753-56.

120. *See* R. Dawson, *supra* note 105, at 173.

121. *Id.* at 184 (defendant's testimony against codefendant may aid the government in proving an otherwise difficult case).



the government will obtain information that may lead to the prosecution of wrongdoers who would otherwise go free.<sup>122</sup> Because judicial sentence bargaining results in sentence variations,<sup>123</sup> however, it does not promote society's interest in the deterrence and rehabilitation of criminals. The defendant who is punished more severely than his informer counterpart may question the legitimacy of the sanction and therefore be less receptive to rehabilitation.<sup>124</sup> At the same time, the informer who has received an inordinately lenient sentence may question the credibility of the criminal justice system and therefore may not be deterred from future offenses.<sup>125</sup> Consequently, the practice serves to "impair the effectiveness and moral legitimacy of the criminal sanction"<sup>126</sup> and ultimately impairs the societal interests in punishment.

A more important distinction between the two practices is the lack of safeguards in the sentence bargaining process to ensure that the defendant is treated fairly. In plea bargaining, assuming that he does not participate in soliciting the plea,<sup>127</sup> the judge ensures that the defendant's waiver of constitutional rights is voluntary.<sup>128</sup> Moreover, if the defendant chooses to assert his right to a jury trial, the jury may acquit or convict him of a lesser-included offense.<sup>129</sup> In judicial sentence bargaining, however, there is no impartial judge or jury to intervene on the defendant's behalf.<sup>130</sup> Without these safeguards, the practice is inherently unfair to the defendant.

122. See *id.* at 183-84; cf. D. Newman, *supra* note 2, at 186-87 (discussing police informant practices).

123. Cf. Note, *The Unconstitutionality of Plea Bargaining*, 83 Harv. L. Rev. 1387, 1397 (1970) (referring to plea bargaining).

124. See Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. Urb. L. 145, 158-59 (1973); Weigel, *Appellate Revision of Sentences: To Make the Punishment Fit the Crime*, 20 Stan. L. Rev. 405, 410 (1968).

125. See Becker, *Crime and Punishment: An Economic Approach*, in *Essays in Economics of Crime and Punishment* 1, 12 (1974); *Transformation of the Criminal Process*, *supra* note 107, at 571.

126. *Transformation of the Criminal Process*, *supra* note 107, at 571; see I. Kant, *The Philosophy of Law* 194-98 (Clark ed. 1887).

127. There is a continuing controversy over whether a judge should participate in plea bargaining because of the potential for coercion. Compare *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966) (defendant coerced into pleading guilty when judge explained consequences of choice of plea to defendant) with *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308 (2d Cir. 1963) (trial judge did not coerce the defendant to plead guilty by merely explaining the consequences attendant upon the prisoner's choice of plea). See generally *Pleas of Guilty*, *supra* note 106, §§ 1.3, 3.1, 3.3; *Trial Judge's Role*, *supra* note 28; Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 Harv. C.R.-C.L. L. Rev. 29 (1974).

128. The Federal Rules of Criminal Procedure require that a judge not accept a guilty plea "without first . . . addressing the defendant personally in open court [to determine] that the plea is voluntary." Fed. R. Crim. P. 11(d).

129. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (jury trial prevents government oppression by providing a "safeguard against the corrupt or overzealous prosecutor").

130. See, e.g., *United States v. Roberts*, 600 F.2d 815, 817-18 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793) ("[U]nder the guise of exercising discretion in sentencing [the judge may be joining] forces with the

Finally, as opposed to judicial sentence bargaining, there is no realistic alternative to plea bargaining. Without it, criminal defendants might always insist on receiving a jury trial, with disastrous consequences for the already overburdened federal court system.<sup>131</sup> The objectives of judicial sentence bargaining, however, can be accomplished by other means. For example, the government could grant defendants immunity in exchange for valuable information in their possession.<sup>132</sup> In fact, law enforcement officers presently grant criminals immunity from arrest or prosecution for certain offenses in order to secure information that may lead to additional convictions.<sup>133</sup> Although the practice allows some individuals to escape criminal liability, it is justified on the grounds that it is necessary to convict other, major criminal offenders.<sup>134</sup> If government officials need information possessed by a criminal defendant, therefore, they should grant the defendant immunity<sup>135</sup> instead of seeking the aid of a sentencing judge to compel self-incriminating information.<sup>136</sup>

#### D. *Balancing the Factors*

Judicial sentence bargaining not only frustrates the policies underlying the fifth amendment privilege against self-incrimination but exacts a penalty—a greater loss of liberty—that makes the assertion of the privilege costly. Although the practice does serve legitimate government interests, it lacks the

prosecutor [to secure] the defendant's cooperation"). *But cf. Trial Judge's Role*, *supra* note 28, at 1107 (in reality, prosecutorial sentence recommendations are universally followed).

131. *Scott v. United States*, 419 F.2d 264, 271 (D.C. Cir. 1969). *But see id.* at 278.

132. *See United States v. Roberts*, 600 F.2d 815, 818 n.13 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793); *R. Dawson*, *supra* note 105, at 96; *cf. Lefkowitz v. Turley*, 414 U.S. 70, 79 (1973) (state can require its employees or contractors to respond to inquiries only if it offers them immunity). Federal law provides that the United States Attorney may request, with the approval of the Attorney General, Deputy Attorney General or any designated Attorney General, the district court to issue an order requiring an individual "to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination," if in the judgment of the United States attorney "(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003 (1976). A grant of immunity is, in effect, not a reward for voluntary cooperation but a recognition of the government's inability to compel a person to testify without safeguarding his right not to incriminate himself. *United States v. Roberts*, 600 F.2d 815, 818 n.13 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793). If the defendant refuses to talk after receiving immunity, the government may seek a contempt order against him. 28 U.S.C. § 1826(a) (1976).

133. *See R. Dawson*, *supra* note 105, at 96, 183-84, 288; *W. LaFave*, *Arrest: The Decision To Take a Suspect into Custody* 132-37 (1965); *D. Newman*, *supra* note 2, at 187, 194-95.

134. *R. Dawson*, *supra* note 105 at 183; *W. LaFave*, *supra* note 133, at 133.

135. 18 U.S.C. §§ 6002, 6003 (1976).

136. In fact, it is likely that the government will obtain more information from a defendant who has received immunity because he can speak without fear of subsequent prosecution. *See id.* § 6003 (confers immunity to extent defendant claims the privilege against self-incrimination). For a further discussion of immunity, see *R. Dawson*, *supra* note 105, at 96, 183-84, 288; *D. Newman*, *supra* note 2, at 187, 194-95.

safeguards that are present in other forms of negotiation between government and defendant. Moreover, the objectives behind the practice can be achieved by an alternative means. The practice, therefore, places an unconstitutional, needless burden on the exercise of the fifth amendment privilege.<sup>137</sup>

### III. JUDICIAL SENTENCE BARGAINING AND THE OBJECTIVES OF SENTENCING

Modern sentencing theory teaches that the interests of society and the criminal defendant are best served when a sentence is adjusted to reflect an individual's prospects for rehabilitation.<sup>138</sup> Underlying this theory is the belief that man is a rational being<sup>139</sup> and that measures can therefore be employed to effect changes in his behavior.<sup>140</sup> Consequently, rehabilitation "seeks to decrease [a defendant's] need to commit acquisitive crimes by increasing his ability to secure employment; it seeks to reduce his desire to commit certain crimes by redirecting his value system [and] to increase his control over antisocial needs and desires by restructuring his personality."<sup>141</sup> In order to achieve these objectives, sentencing judges assess the defendant's rehabilitative potential by considering a multitude of factors illustrative of his ability or inability to adjust to society.<sup>142</sup>

The defendant's willingness to cooperate, however, may not be indicative of his rehabilitative potential.<sup>143</sup> His refusal to inform may be caused by well-founded fears of reprisals against himself or his family rather than by a hostile attitude towards society or a reluctance to reform.<sup>144</sup> Defendants who do cooperate, on the other hand, are often motivated more by their desire to injure former associates or to obtain a lenient sentence or other special treatment from the government than by feelings of remorse or urges to be

137. Cf. *United States v. Jackson*, 390 U.S. 570, 581 (1968) (statute that has no purpose or effect other than to deter the assertion of constitutional rights by penalizing individuals who exercise them is "patently unconstitutional").

138. See notes 13-14 *supra* and accompanying text.

139. See note 13 *supra* and accompanying text.

140. Task Force, *supra* note 1, at 73-74; Advisory Council of Judges of the National Probation and Parole Association, *Guides for Sentencing* 3-4 (1957) [hereinafter cited as *Guides for Sentencing*]; A. Campbell, *supra* note 10, § 8; W. LaFave & A. Scott, *Handbook on Criminal Law* § 5, at 23 (1972).

141. Task Force, *supra* note 1, at 73-74; see A. Campbell, *supra* note 10, § 5; National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report on Corrections* 43 (1973) [hereinafter cited as *Corrections*]; Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. Va. L. Rev. 263, 280 (1975).

142. Some examples of the factors considered by a sentencing judge are the defendant's age, health, family situation, previous record and education. *Guides for Sentencing*, *supra* note 140, at 5, 29, 33-45; see A. Campbell, *supra* note 10, § 85; *Corrections*, *supra* note 141, at 184-85.

143. See *DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979).

144. *Id.* at 75; see, e.g., *In re Quarles*, 158 U.S. 532, 533 (1895) (informer beat, bruised, shot at and otherwise ill-treated); *United States v. Toombs*, 497 F.2d 88, 90 n.1 (5th Cir. 1974) (informer shot three times); *Swanner v. United States*, 406 F.2d 716, 717 (5th Cir. 1969) (informer's house bombed, injuring his family). Compare *Widger v. United States*, 244 F.2d 103, 106 (5th Cir. 1957) (court "would not lightly require a witness to testify if it were convinced that death or serious bodily harm would result therefrom") with *LaTona v. United States*, 449 F.2d 121, 122 (8th Cir. 1971) ("The concept of due process does not encompass the privilege of a witness not to testify because of fear of reprisals.").

good citizens.<sup>145</sup> Yet it is possible that a cooperating defendant is motivated by a sincere desire to reform. Because a defendant's willingness to cooperate can be explained by such inconsistent motivations, the utility of cooperation as an indication of rehabilitative potential depends on the judge's ability to determine the defendant's true intentions accurately. Thus, it is a less reliable indicator of rehabilitative potential than other, more objective factors considered by sentencing judges.<sup>146</sup>

Varying the length of a defendant's sentence according to the extent of his willingness to cooperate, moreover, may tend to undermine the deterrent purpose served by the imposition of sentence.<sup>147</sup> Convicted criminals may learn that they can bargain for more lenient sentences through cooperation. Consequently, they may become more confident of their ability to manipulate the criminal justice system and may not, therefore, be deterred from future criminal activity. This lack of deterrence injures both the defendant and society.<sup>148</sup>

Consideration of the defendant's willingness to cooperate does not significantly advance the criminal defendant's or society's interests in the imposition of sentence. It neither provides an accurate assessment of the defendant's rehabilitative potential nor facilitates deterrence. Accordingly, the practice must yield to the individual's interest in resisting compulsory self-incrimination.<sup>149</sup> As already noted, however, the discretion of federal sentencing judges to consider information relevant to the individualization of sentence is essentially limited only by constitutional considerations.<sup>150</sup> Thus, only in the absence of the countervailing individual interest in exercising the

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145. *DiGiovanni v. United States*, 596 F.2d 74, 75(2d Cir. 1979); R. Dawson, *supra* note 105, at 288-89; D. Newman, *supra* note 2, at 187 (defendants who inform are often confirmed criminals).

146. The factors considered in imposing sentence usually include the nature and circumstances of the criminal offense, the offender's educational and employment background, social history, residence history, medical history, prior criminal record, explanation for the crime and his attitudes towards society. Corrections, *supra* note 141, at 184-85; *see United States v. Grayson*, 438 U.S. 41, 50-51 (1978) (judge may consider his belief that the defendant perjured himself in imposing sentence). Except for the last consideration, none of the factors entails an assessment of the defendant's state of mind; hence, they can be applied with more certainty. For example, the sentencing judge in *Grayson* was able to rely upon the jury's implicit rejection of the defendant's testimony and the government's conflicting evidence in deciding that the accused committed perjury.

147. *See* notes 123-26 *supra* and accompanying text.

148. *See* notes 125-26 *supra* and accompanying text.

149. *See* pt. II *supra*.

150. *See DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979); pt. II *supra*. In *United States v. Grayson*, 438 U.S. 41, 51 (1978), the Supreme Court upheld a sentencing judge's consideration of his belief that the defendant perjured himself as being indicative of the defendant's rehabilitative potential despite the implication of the defendant's right to due process. *Grayson*, however, is distinguishable from the judicial sentence bargaining cases. Perjury involves a deliberate choice to lie when there is a legal duty to tell the truth, *id.* at 52; it therefore is conclusive evidence of a defendant's lack of rehabilitative potential. *Id.*; *see United States v. Roberts*, 600 F.2d 815, 817 (D.C. Cir.) (en banc) (per curiam) (denial of rehearing) (Bazelon, J., dissenting), *cert. granted*, 100 S. Ct. 42 (1979) (No. 78-1793). A defendant who refuses to inform, on the other hand, simply chooses not to act when he has no affirmative duty to act; he is merely exercising a constitutionally protected right to remain silent. *Id.*

constitutional right to remain silent—as when a defendant is asked merely to incriminate others—should federal sentencing judges not be foreclosed from considering a defendant's willingness to cooperate.<sup>151</sup>

*Patricia A. Perrotta*

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151. It is unclear whether federal appellate courts can review sentences within the statutory guidelines absent a constitutional violation. The Supreme Court has determined that sentencing is largely within the broad discretion of the sentencing judge. *Blockburger v. United States*, 284 U.S. 299, 305 (1932). The Court, however, has stated that the information considered by the judge must be reliably established and reasonably related to a recognized purpose of sentencing. *United States v. Tucker*, 404 U.S. 443, 447 (1972). Thus, if the consideration by a sentencing judge of a defendant's willingness to cooperate is challenged as not being indicative of his rehabilitative potential, appellate courts can probably review the sentence under their supervisory power. *Cf. Barker v. Wingo*, 407 U.S. 514, 530 n.29 (1972) (federal courts of appeal have supervisory power over the federal district courts to ensure the proper administration of justice). *See generally* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 *Geo. L.J.* 1050 (1965).